

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

STATE OF OKLAHOMA’S MOTION FOR PROTECTIVE ORDER AND
INTEGRATED MEMORANDUM IN SUPPORT

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Plaintiff, the State of Oklahoma (“the State”), pursuant to Fed. R. Civ. P. 26(c), respectfully moves the Court for a protective order to prevent the disclosure of identifying information of survey respondents involved in the study conducted by the State’s experts in the natural resource damage assessment performed in this action.¹ Defendants have sought such information directly from the State in connection with its production of expert materials, and Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb Vantress, Inc. (collectively, “Tyson Defendants”) have sought such information pursuant to three subpoenas duces tecum (“Subpoenas”) issued by such Defendants to: (1) Consumer Logic, Inc.; (2) Westat, Inc.; and (3) Wilson Research Strategies. These entities are three independent contractors retained by the State’s experts in connection with the natural resource damage assessment. The Notices of Subpoena dated January 29 and 30, 2009 and the subpoenas at issue are attached hereto as **Exhibits A** (as to Consumer Logic), **B** (as to Westat), and **C** (as to Wilson Research Strategies).

I. INTRODUCTION

The personal identifying information of survey respondents and pre-main survey participants that Defendants have requested from the State and that the Tyson Defendants seek pursuant to the Subpoenas is beyond the proper scope of discovery. Such information was not relied upon or considered by the State’s experts in reaching their findings, and Defendants do not require knowledge of the identities of the survey respondents to test the reliability of the survey results. Moreover, disclosure of the identities of these individuals, which would most likely be followed by Defendants contacting them and interrogating about their survey responses or pre-survey participation, would have a chilling effect on the ability of researchers to obtain unbiased

¹ Pursuant to Fed. R. Civ. P. 26(c)(1) and LCvR 7.1(g), the State hereby certifies that it has in good faith conferred with Defendants in an effort to resolve the dispute without court action.

information from a willing public on important public policy issues and would breach the professional standards to which survey researchers hold themselves regarding confidentiality. Accordingly, the State requests that the Court enter an order protecting the confidentiality of survey respondents.

II. FACTUAL BACKGROUND

A. The Contingent Valuation (CV) Report and the Survey

1. *The CV Report*

On January 5, 2009, the State designated its damages expert witnesses and produced its expert reports pursuant to the Amended Scheduling Order dated November 15, 2007 (Doc. #1376). One of the reports was entitled “Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma’s Illinois River System and Tenkiller Lake – Expert Report for State of Oklahoma, in Case No. 05-CV-0329-GKF-SAJ” (Volume I of which is attached hereto as **Exhibit D**). (Hereafter, the State refers to this report as the “CV Report” or “CV study.” Unless otherwise indicated, all references are to Volume I of the CV Report.) The CV Report provides an estimate of the monetary value placed on aesthetic and ecosystem injuries to the Illinois River system and Tenkiller Lake from 2009 to 2058 for the Illinois River system and from 2009 to 2068 for Tenkiller Lake. The method used to estimate such damages was contingent valuation (“CV”). Ex. D, CV Report p. 1-6.

2. *Contingent Valuation*

Some brief background on CV is appropriate. Contingent valuation is an accepted survey-based economic methodology commonly used to measure use and non-use values² for a

² “Use values” are those values affected when members of the public personally use injured resources or would have used them if uninjured. “Non-use values” are values that people place on natural resources for reasons other than for personal use. Ex. D, CV Report, p. 1-4.

wide variety of tangible and intangible things that do not have a readily determinable market value. Contingent valuation methodology was first developed over 60 years ago. *See, e.g.,* S.V. Ciricacy-Wantrup, *Capital Returns from Soil Conservation Practices*, Journal of Farm Economics (Nov. 1947). The first published CV study, examining outdoor recreation in Maine, was issued over 40 years ago. *See* R.K. Davis, *Recreational Planning as an Economics Problem*, 3 Natural Resources Journal (1963). It has been widely used ever since. *See, e.g.,* *Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432, 477-78 (D.C. Cir. 1989) (allowing CV to measure damages). Since 1963, over 6,000 papers have been published on CV in the United States and abroad, a significant number of which have appeared in the peer reviewed economics literature. Ex. D, CV Report at ES-1. According to the United States Department of the Interior (“DOI”), “[i]n recent years, CV has become one of the most widely used methods of nonmarket valuation.” 59 Fed. Reg. 23098, 23100 (1994).

For example, both the DOI and the National Oceanic and Atmospheric Administration (“NOAA”) authorize the use of contingent valuation methodology to assess and recover natural resource damages. *See id.* at 23108; 51 Fed. Reg. 27674, 27720 (1986); *id.* at 27721 (CV is a “valid, proven technique[] when properly structured and professionally applied”); 58 Fed. Reg. 4601 *et seq.* (1993) (NOAA Panel Report); 61 Fed. Reg. 440, 499 (1996). Other areas of government have also used the methodology. *See, e.g.,* President Clinton’s Clean Water Initiative (March 1994) (CV used in analysis of water quality improvements); U.S. Army Corps of Engineers, *National Economic Development Procedures Manual - Recreation, A Guide for Using the Contingent Valuation Methodology in Recreation Studies* (March 1986).

3. The Survey

To perform the CV study in this case, the State’s team of internationally known experts in

environmental economics, natural resource damage assessments, and survey methodology led by Stratus Consulting (collectively, “Stratus experts”) developed a survey that was administered to a large sample of Oklahoma residents. The CV study, which was conducted over a more than two-year period, was undertaken within a framework of natural resource damage assessment (“NRDA”) as presented in the DOI’s NRDA regulations. Ex. D, CV Report, p. ES-1. Several activities were involved prior to the main survey’s implementation. The Stratus experts used a telephone survey, focus groups, one-on-one interviews, pre-testing and pilot tests to develop and refine the questionnaire that was used in the final survey prior to implementation. *Id.*, Ch. 3. Stratus retained Wilson Research Strategies for logistical support for one night of focus groups. Stratus used Consumer Logic for all remaining focus groups, one-on-one interviews, pretesting, and a telephone survey. Stratus also retained Westat, the largest statistical survey research organization of its kind in the United States, to implement two pilot field studies, as well as the main and scope surveys. *Id.*, Chs. 3.6 and 5. Westat conducted the final in-person door-to-door survey of Oklahoma residents (“main survey”). *Id.*, p. ES-1. The CV study developed a conservative measure of these damages, by estimating the mean willingness-to-pay for a program that would return the flow of services from the Illinois River system and Tenkiller Lake to their 1960 condition 40 years sooner than without the program. *Id.*, p. 1-9.

B. Expert Discovery

As stated above, on January 5, 2009, the State designated its damages expert witnesses and produced its expert reports. The State also produced at that time *all* materials considered by the authors of the CV Report in accordance with Fed. R. Civ. P. 26. The State produced more than adequate materials to enable Defendants to analyze and respond to the CV Report. Specifically, between the CV Report, its appendices, and the materials considered by the Stratus

experts, the materials that have been produced to the Defendants include, but are not limited to, the following:

- 1) A thorough description of the development of the survey instrument, including a description of the dates, locations, and number of participants in each of the focus groups;
- 2) descriptions of the one-on-one interviews, the pretesting, and pilot tests conducted as the survey instrument was developed;
- 3) materials used by the Stratus team during the focus groups, one-on-one surveys, pretesting, and pilot tests, including scripts, forms, images, and drafts;³
- 4) all documents completed by focus group and pretesting respondents;
- 5) a complete explanation of the manner in which the sample for the survey was selected;
- 6) the project-specific materials created for training the interviewers who conducted the survey interviews;
- 7) a section by section explanation of the survey instrument itself;
- 8) working drafts of the survey instrument;
- 9) scripts, images, and materials used to conduct the survey interviews;
- 10) electronic data files transmitted from Westat to Stratus containing each of the responses every respondent provided;
- 11) correspondence between the Stratus experts and between the Stratus experts and Westat personnel;
- 12) files containing the analysis performed on the Westat survey data by the Stratus team and program scripts to conduct that analysis; and
- 13) three reports from Westat explaining its work on this project, as well as previous drafts of reports provided to the Stratus team members.

³ When conducting focus groups, one-on-one interviews, and the pretests, the Stratus experts would create and bring all of their own substantive materials, and the Stratus team retained the substantive materials created during these events, all of which have been produced in the considered materials of the Stratus experts. The roles of Consumer Logic and Wilson Research were limited to providing physical space and recruiting the individuals for participation in these events, and they did not provide substantive input into the sessions, which were conducted by the Stratus team's personnel.

In total, the State has already produced over 12 gigabytes of material from the Stratus experts who wrote the CV Report, including all of their considered materials, correspondence pertaining to their work in this case, and notes.

III. PROCEDURAL BACKGROUND

Not satisfied with the State's full compliance with its Rule 26 obligation to produce the "considered materials" of the authors of the CV Report, the Defendants demanded in a January 21, 2009 email that the State "1) produce all materials as to the identity of, and contact information for, the survey participants and 2) produce the transcripts, videotapes and/or audio tapes of interviews of such survey participants." (Email from D. Ehrich to C. Xidis dated January 21, 2009 (attached as **Exhibit E**.) The State responded that all considered materials by the CV Report's authors had been timely produced on January 5, 2009. (Email from C. Xidis to D. Ehrich dated January 23, 2009 (**Exhibit E**.) Defense counsel asked in return whether the State objected to Defendants contacting directly the survey firm that conducted the survey, and the State so objected, pointing out that the State's expert, Stratus Consulting, had retained the survey firm. (Email exchange between R. George and C. Xidis dated January 23, 2009 (**Exhibit E**.) Defendants concluded the exchange by stating that they would file a motion to compel (*id.*), and on January 28, 2009, the parties had a meet and confer on this issue.

Instead of following through with a motion to compel, on January 29 and 30, 2009, the Tyson Defendants issued subpoenas duces tecum to Consumer Logic, Westat, and Wilson Research Strategies. (**Exhibits A-C**.) These entities timely objected pursuant to Fed. R. Civ. P. 45, on several grounds, including that the subpoenas seek the production of confidential respondent-identifying information. A compendium of such objections is attached as **Exhibit F**. The State similarly objected to such subpoenas. (**Exhibit G**.)

IV. ARGUMENT

The State seeks a protective order to (i) prevent the disclosure of survey respondent identities as confidential information pursuant to Fed. R. Civ. P. 26(c)(1)(G) and (ii) preclude Defendants from contacting survey participants in connection with the CV survey. Such an order is warranted because, under the Court's balancing test, the survey researchers' ethical commitment to confidentiality, the public interest in protecting survey respondents' identities in survey research and the harm that would result from disclosure, coupled with the provision to Defendants of all "considered materials" underlying the Report, clearly outweigh Defendants' discovery interest.

A. Standard of Review

Pursuant to Fed. R. Civ. P. 26(c) ("Rule 26(c)"), a district court enjoys broad discretion in supervising the course and scope of discovery. Rule 26(c)(1) provides in relevant part:

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(G) *requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way*

Fed. R. Civ. P. 26(c)(1) (emphasis added).

Upon a showing by the movant that the information sought is confidential and that its disclosure would be harmful, the burden shifts to the party seeking discovery to establish that the information is relevant and necessary to the action. *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 n.4 (10th Cir. 1981). Even upon a showing of relevancy and need, discovery may still be precluded if the discovery requests remain unreasonable, oppressive, annoying, or embarrassing. *Id.* at 326, citing *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997-98 (10th Cir. 1965); see also *Centurion Indus.*, 665 F.2d at 326 n.6. In considering whether to issue a protective order pursuant to Fed. R. Civ. P. 26(c), the Court weighs the interests of the party seeking discovery against the interests of the party seeking to preserve confidentiality, *Centurion Indus., Inc.*, 665 F.2d at 325 n.4, giving more weight to those interests having a distinctively social value than to purely private interests, *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 169 (E.D.N.Y. 1988). “Court[s] may deny discovery of information notwithstanding some claim of relevance when the balancing of the benefit is outweighed by the harm to other interests.” *United States v. Arthur Young & Co.*, No. 84-C-606-B, 1984 U.S. Dist. LEXIS 22991, at *11-12 (N.D. Okla. Oct. 5, 1984)

This discretion includes the power to prohibit or limit the discovery of participants in survey and other scientific research. See, e.g., *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546 (11th Cir. 1985) (affirming district court’s issuance of protective order); *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 391 (N.D. Cal. 1976) (denying motion to compel).

B. The State Requests That This Court Enter a Protective Order (i) Protecting from Disclosure Confidential Identifying Information Related to Study Participants and (ii) Prohibiting Defendants or Their Representatives from Contacting Such Individuals

The State respectfully requests that this Court enter a protective order (i) protecting from disclosure the production of documents or tangible things containing any confidential information relating to participants in the final survey, the one-on-one interviews, the telephone survey, the focus groups, the pretest, and the pilot test and (ii) prohibiting Defendants from contacting any such individuals. The Tyson Defendants, through their Subpoenas, have specifically requested that Consumer Logic, Westat, and Wilson Research Strategies provide, among other things, identifying information about all participants in the various phases of the CV study. Limited information about certain participants in the study not involved in the main survey, as well as individuals in the survey sample, was contained within the “considered materials” production of January 5, 2009, for the reason that it was in the possession of certain CV Report authors. As discussed below, the code of professional ethics governing the conduct of surveys mandates that information that could identify respondents be kept confidential. In addition, the protection of respondent confidentiality is essential for researchers to carry out surveys that are based on unbiased samples and that elicit accurate answers from respondents. Moreover, second interviews of the survey respondents by Defendants could not, as a matter of proper survey techniques, produce any relevant evidence in this case. Finally, Defendants already have more than sufficient information to assess the CV Report and the bases for that Report without personal identifying information of participants.

1. *The Law Presumes That Survey Respondents’ Identities Will Be Kept Confidential Even in the Context of Litigation*

The law presumes that the confidentiality of survey respondents’ identities will be preserved, even in the context of litigation.

The Federal Judicial Center’s Reference Manual on Scientific Evidence (2d ed. 2000) (“FJC Reference Manual”), which is based on extensive research into a variety of scientific

issues and disciplines for the purpose of assisting federal judges in managing expert scientific evidence, presumes that the confidentiality of survey respondents' identities should be maintained in the litigation context. The FJC Manual expressly recognizes the ethical obligation on the part of survey researchers to maintain the confidentiality of respondents' identities. The Manual includes a section on surveys entitled "In Surveys of Individuals, What Measures Were Taken to Protect the Identities of Individual Respondents?," which states:

Conflicts may arise when an opposing party asks for survey respondents' names and addresses in order to reinterview some respondents. The party introducing the survey or the survey organization that conducted the research generally resists supplying such information. Professional surveyors as a rule guarantee confidentiality in an effort to increase participation rates and to encourage candid responses. Because failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents' identities. ***'The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity.'*** Although no surveyor-respondent privilege currently is recognized, ***the need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.***

Copies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. All identifying information, such as the respondent's name, address, and telephone number, should be removed to ensure respondent confidentiality.

Id. at 271-72 (emphasis added and footnotes omitted); *see also id.* at 272 n.162, citing CASRO and AAPOR standards described below.

Moreover, the major associations in the field of survey research have ethical codes requiring the protection of respondent confidentiality. The two leading professional survey research associations are the Council of American Survey Research Organizations ("CASRO") and the American Association for Public Opinion Research ("AAPOR"). These organizations'

standards governing the preservation of survey respondents' confidentiality are set forth in CASRO's Code of Standards and Ethics for Survey Research (Rev. 2008) ("CASRO Code") (attached as **Exhibit H**) and AAPOR's Code of Professional Ethics & Practices (Rev. 2005) ("AAPOR Code") (attached as **Exhibit I**). All CASRO and AAPOR members sign a pledge to abide by these standards. *See Ex. H*, CASRO Code, Introduction; *Ex. I*, AAPOR Code, Preamble. Indeed, in giving this guidance to the federal courts, the FJC Manual expressly acknowledges the CASRO and AAPOR ethical standards governing survey researchers. FJC Manual at 272 n.162.

The CASRO Code's provisions governing the confidentiality of respondents' identities are extensive. Such provisions include, but are not limited to:

- "Since individuals who are interviewed are the lifeblood of the Survey Research Industry, it is essential that Survey Research Organizations be responsible for protecting from disclosure to third parties – including Clients and members of the Public – the identity of individual Respondents as well as Respondent-identifiable information, unless the Respondent expressly requests or permits such disclosure." (Ex. H, CASRO Code, § I.A.1.)
- "The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity. Consequently, Survey Research firms confronted with a subpoena or other legal process requesting the disclosure of Respondent-identifiable information should take all reasonable steps to oppose such requests, including informing the court or other decision-maker involved of the factors justifying confidentiality and Respondent anonymity and interposing all appropriate defenses to the request for disclosure." (*Id.*, § I.3.f.)
- "While Clients are encouraged to examine questionnaires or other records to maintain open access to the research process, the Survey Research Organization must continue to protect the confidentiality and privacy of survey Respondents." (*Id.*, § II.B.3.)

The AAPOR Code, which guarantees the protection of confidential identifying information in the litigation context, also contains similar provisions, such as:

- “We shall respect respondents’ concerns about their privacy.” (Ex. 1, AAPOR Code, § II.D.2.)
- “Unless the respondent waives confidentiality for specified uses, we shall hold as privileged and confidential all information that might identify a respondent with his or her responses. We also shall not disclose or use the names of respondents for non-research purposes unless the respondents grant us permission to do so.” (*Id.* § II.D.5.)
- “***We understand that the use of our survey results in a legal proceeding does not relieve us of our ethical obligation to keep confidential all respondent identifiable information or lessen the importance of respondent anonymity.***” (*Id.*, § II.D.6 [emphasis added].)

A number of courts have similarly recognized the need to preserve the confidentiality of survey participants’ personal identifying information. *See Farnsworth*, 758 F.2d at 1545 (prohibiting disclosure of respondent identities because of potential harm to social research surveying); *Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58, 60 (N.D. Ga. 1982) (“The information obtained by the CDC from its subjects in the studies on TSS is quite personal and sensitive. It is imminently appropriate to protect the subjects of the CDC studies, who may have no connection with this lawsuit, from questions by strangers about such personal matters.”); *Richards of Rockford, Inc.*, 71 F.R.D. at 390 (denying motion to compel disclosure of survey respondents and stating: “[c]ompelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest”); *see also In re Litton Indus., Inc.*, No. 9123, 1979 FTC LEXIS 311, at *12-13 (FTC June 19, 1979) (denying motion to compel production of respondents’ identities, stating: “Public opinion polls and surveys are becoming increasingly important to both the courts and the business community. . . . Since we are so dependent on surveys for much of the data upon which daily decisions are made, every attempt should be made to protect their accuracy. . . . If the survey-respondents believe they are going to be routinely re-interviewed and cross-examined in connection with any poll in which they participate, they will either refuse to

participate or be guarded in their answers. In either event the survey method of gathering information is impaired.”).

For example, in *Farnsworth*, 758 F.2d 1545, the Eleventh Circuit Court of Appeals affirmed the district court’s grant of a Rule 26(c) protective order, which denied access to survey participants’ identifying information. *Id.* at 1546. Specifically, in that product liability action alleging that defendant Procter & Gamble Company’s (“P&G”) product caused Toxic Shock Syndrome, where plaintiffs intended to introduce into evidence a Center for Disease Control (“CDC”) study showing such a link, P&G sought the study participants’ identities.⁴ *Id.* While recognizing that P&G had an interest in such information related to its trial preparation and defense, the district court held – and the Eleventh Circuit affirmed – that the CDC’s interest in preserving the participants’ confidentiality outweighed P&G’s discovery interest. *Id.* at 1547. The court reasoned that (a) the ability to conduct scientific and social research depends on a population willing to submit to in-depth questioning and (b) P&G had already been provided a vast amount of information regarding the study. *Id.* at 1547-48. The same holds true here.

Relatedly, in *Applera Corp. v. MJ Research, Inc.*, 389 F. Supp. 2d 344 (D. Conn. 2005), the defendants moved for a new trial on the ground that the survey researchers in that case refused to disclose respondents’ identities. The district court rejected the argument and reaffirmed a ruling it rendered during trial, stating that “researchers are prohibited by ethical rules from disclosing the actual individual identities of the survey respondents and instructed to defend against Court orders compelling disclosure.” *Id.* at 350. The court expressly cited, and directly relied upon, the FJC Reference Manual’s instruction against disclosure discussed above. *Id.*

⁴ No promise of confidentiality had been given the participants. *Id.* at 1546.

In short, requiring disclosure of respondent-identifying information in this case would force a breach of these ethical obligations. It is in the public interest to assure the accuracy of survey research. Maintaining participant confidentiality is necessary if surveys are to produce accurate information.

2. *Defendants Do Not Need This Confidential Information to Attempt to Test the Validity of the CV Study*

The names and identities of the focus group participants and survey respondents are not necessary for Defendants to prepare a defense against conclusions reached by the State's damages experts in the CV study. In the absence of a particularized need, the issuance of a protective order is warranted. Other courts have so held. *See, e.g., Lampshire*, 94 F.R.D. at 60 (“there has been an insufficient showing of necessity to warrant the invasion of the personal privacy of the participants of the CDC studies”). As the district court noted in *Applera*, 389 F. Supp. 2d at 350, the defendant had sufficient data, even in the absence of personal identifying information about survey respondents, to allow it to “conduct[] its own survey . . . to test the reliability of [the expert's] methodology and/or results.”

Another court approached the analysis slightly differently. In *Comm-Tract Corp. v. Northern Telecom Inc.*, 143 F.R.D. 20 (D. Mass. 1992), the court reasoned that “the purpose for which [the plaintiff] intends to use the evidence impacts upon whether the specific information as to respondents must be disclosed.” *Id.* at 21-22. The court explained:

To the extent that the survey would be utilized as evidence of the respondents' state of mind, present sense impressions or subjective mental associations, [defendant's] need to know the identity of the participants and to tie the respondents with a specific response is de minimus. In such circumstances, the defendant can challenge the evidence by implicating the “circumstantial guarantees of trustworthiness,” i.e., the methodology employed, the survey design, the form of questionnaires, the sampling techniques, etc. . . . The same cannot be said to the extent that the survey is used as “no more than a summary and distillation of . . . extrajudicial declarations offered to prove the truth of the matters asserted in those declarations” In that circumstance, the only way

[the defendant] could counter the evidence would be to test the specific individual responses of the survey participants. This is equally true whether the survey itself is sought to be admitted or whether an expert intends to offer such an opinion based on the survey results.

Id. at 22 (emphasis added).⁵

The CV study falls into the first category – evidence of present sense impressions, perceptions, and beliefs – because it was utilized by the experts to determine how Survey respondents *value* the changes to the Illinois River system and Lake Tenkiller. The CV Report presents a series of tabulations of percentages of responses to the valuation question posed in the Survey and “shows that ***the results are consistent with people’s beliefs*** and characteristics, and with theoretical expectations.” Ex. D, CV Report, p. 6-1; *see generally id.*, Ch. 6. Defendants have the results of every single survey response (without data revealing personal identifying information). Moreover, the Stratus experts did not consider the survey respondents’ personal identifiers in reaching the findings expressed in the CV Report.

Accordingly, disclosure and attendant re-interviewing of Survey respondents are not required because the Defendants have alternative means to test the reliability of the State’s CV study. To do so, they can attempt to challenge the sample size, the survey design, the sampling techniques, or a host of other scientific challenges to the adequacy of the Survey itself and contingent valuation methodology. None of these challenges requires identifying information of the participants themselves. *See In re Litton Indus., Inc.*, 1979 FTC LEXIS 311, at *14 (denying

⁵ Although the court in *Comm-Tract* ultimately ordered disclosure of the respondents’ identities, it only did so after a detailed analysis under circumstances not implicated in this case. Specifically, the court analyzed the purpose for which the survey data would be used, concluding that the survey would be offered to prove the truth of the matters asserted in specific answers. *Id.* at 23. The court found it clear that the specific answers, and the expert opinion based upon them, “would be offered not to demonstrate ‘customer perception’ but rather for the truth of the matters asserted. . . . Northern Telecom could effectively counter such evidence at trial only by being able to test the specific individual responses of the survey participants.” *Id.*

motion to compel production of information connecting respondents' identities and questionnaires; finding that defendant had sufficient information to defend itself against the surveys).

Finally, if it were truly necessary to know the identities of survey respondents in order to challenge the validity of a survey, then the professional associations of survey researchers would permit disclosure of such information, rather than require survey researchers to defend against disclosure, and the Federal Judicial Center would not accord such deference, even in the litigation context, to the ethical standards that govern survey research, which require the preservation of the confidentiality of survey respondents.

III. CONCLUSION

For each of these reasons, the State respectfully requests that this Court issue a protective order (i) protecting from disclosure the production of documents or tangible things containing any confidential information relating to participants in the final survey, the one-on-one interviews, the telephone survey, the focus groups, the pretest, and the pilot test and (ii) prohibiting Defendants from contacting any such individuals.

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